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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215512
Party	Plaintiff BODY VIBE INTERNATIONAL, LLC
Correspondence Address	THOMAS P PHILBRICK ALLMARK TRADEMARK 2089 AVY AVE MENLO PARK, CA 94025 UNITED STATES tom@allmarktrademark.com, allmarktrademark@gmail.com
Submission	Motion to Extend
Filer's Name	Thomas P. Philbrick
Filer's e-mail	tom@allmarktrademark.com, allmarktrademark@gmail.com
Signature	/Thomas P. Philbrick/
Date	01/23/2015
Attachments	Motion to extend discovery period DR VAPE.pdf(1055167 bytes) CERTIFICATE OF SERVICE for motion to extend discovery period.pdf(112547 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re application serial no. 85966358 (DR. VAPE)

Filed on June 21, 2013

BODY VIBE INTERNATIONAL, LLC)	
)	
Opposer,)	
)	Opposition No. 91215512
v.)	
)	
Cox, David)	
)	
)	
Applicant.)	
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Trademark Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

**OPPOSER'S MOTION TO EXTEND DISCOVERY PERIOD AND TO SUSPEND
OPPOSITION PENDING DISPOSITION OF CURRENTLY OUTSTANDING MOTIONS**

BODY VIBE INTERNATIONAL, LLC, a limited liability company legally organized under the laws of New Mexico, with a principal place of business of 11445 E. Via Linda, Suite 2626, Scottsdale, AZ 85259, (hereinafter "Opposer"), hereby submits the following motion to extend the discovery period and to concurrently suspend this opposition case pending the Board's order on the currently pending motions relating to this case. Pursuant to TBMP 509.01, Opposer submits that this motion should be construed as a "motion to extend" as the discovery period as reset has not yet closed. (Discovery as reset is currently set to close at the end of the day today, January 23, 2015.)

A. Background/Procedural History

On March 19, 2014, Opposer filed this opposition proceeding against serial number 85966358 for the mark DR. VAPE. (hereinafter “Applicant’s Mark”) Applicant filed his answer to the original notice of opposition on April 24, 2014 which included a statement in paragraph 12 that “Applicant David Cox has been selling his **cannabis-associated** vaporizer in interstate commerce.” (bold and underlining added) Realizing his inadvertent disclosure that Applicant’s Mark is possibly not in lawful use in commerce, Applicant promptly filed an amended answer as a matter of right on April 28, 2014, just 4 days after his original answer filing. On July 25, 2014, after discovering additional information about the Applicant, Opposer filed a motion to amend the notice of opposition to add a claim for “not in lawful use in commerce.” Opposer’s motion to amend the opposition was granted by order from the Board on October 3, 2014. Applicant subsequently filed his answer to Opposer’s First Amended Notice of Opposition on October 17, 2014. After carefully reviewing and considering Applicant’s October 17, 2014 answer to amended opposition, Opposer served a Rule 11 Motion for sanctions on Applicant via 1st class mail on December 19, 2014. (Opposer’s Rule 11 Motion is filed concurrently herewith.) With the 21 day “safe harbor” provided under Rule 11, (“plus 5 days” due to service via 1st class mail), the first day Opposer could have possibly filed its Rule 11 motion at the TTAB was on or about January 14th or 15th of 2015. Via his attempted motion to amend his answer pleading currently of record, **Applicant is attempting to circumvent the Board’s Rule 11 procedures by filing his motion to amend his answer one or two days prior to the time when Opposer would have been first permitted to file its Rule 11 motion.**

B. Argument Regarding “Good Cause” to Extend Discovery Period and Suspend this Opposition Case Pending the Outcome of the Currently Pending Motions

Under TBMP 509.01(a), a Motion to Extend may be granted if the movant demonstrates “good cause.” In the present case, Opposer submits that the requisite “good cause” is simply illustrated by the fact that Applicant’s own “motion for leave to amend” (filed on January 13, 2015) precipitated the filing of this motion to extend the discovery period. Ordinarily, Opposer simply would have permitted discovery to close as it served its discovery today, and realizes that the Board normally will not grant a motion to extend simply because a party waited until late in the period to serve its requests. The facts at hand are decidedly different than that scenario however given that Applicant’s motion to amend its current answer of record leaves many open questions for the parties. For example, the Board could conceivably grant Applicant’s motion (however unlikely), in which case, justice would require that Opposer be permitted to conduct additional discovery regarding the Applicant’s amended averments. Alternatively, the Board could grant Opposer’s Rule 11 Motion filed concurrently herewith which could prompt a final judgment in Opposer’s favor or an order instructing Applicant to cure its Rule 11 violations. Regardless of the outcome of the various pending motions, absent an outright judgment in Opposer’s favor, Opposer should be permitted to conduct follow up discovery on the Applicant as it doesn’t even know what the final substance of Applicant’s answer will be at trial. To rule otherwise on this motion to extend would be to deprive Opposer its opportunity to conduct discovery relating to Applicant’s averments in its final answer of record. Given the foregoing, Opposer submits that it easily meets the burden of showing “good cause” for the granting of this motion to extend the discovery period. (as well as subsequent trial schedule/disclosure dates.)

The simple facts are that Applicant created the necessity for an extension to the discovery period by virtue of his own last minute motion to amend his current answer of record.

C. Diligence

In addition to illustrating that it possesses “good cause,” for the grant of this motion to extend, per TBMP 509.01(a), Opposer must show that “the requested extension of time is not necessitated by the party’s own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor.” Here, while Opposer has just served its first set of discovery requests, it is requesting this extension to the discovery period due purely to the actions of Applicant who just filed a last minute motion to amend his answer of record. Opposer hasn’t delayed in any respect in filing this motion as it just received the service copy of Applicant’s motion for leave to amend in addition to noticing the filing appear on the TTAB’s website. Opposer cannot be seen as “lacking diligence” either, as it would not have brought this motion but for the last minute actions of the Applicant who is attempting to amend his current answer of record. Opposer is being diligent by promptly filing this motion shortly after the receipt of the Applicant’s last minute motion to amend his pleading.

D. Relief Requested/Proposed Order

Should the Board find the requisite good cause for the granting of this motion to extend, Opposer respectfully requests that discovery (and all corresponding subsequent trial schedule dates) be extended for a period of 90 days after such time that the Board may rule on this motion.

(Opposer realizes that it may take a significant amount of time to rule on the various motions currently on file and the case should be suspended during this time so that the parties can sort out which answer will be of record or, whether the opposition will be sustained in Opposer's favor.) Alternatively, if the Board looks unfavorably upon the Opposer's service of its discovery requests at the end of the currently set period, Opposer requests that it at a minimum have discovery (including trial schedule) reset for the purpose of conducting follow up discovery on any aspect of Applicant's amended answer that is different from the answer currently of record for this case.

E. Conclusion

In sum, Opposer notes that this is its first extension request filed in connection with this case and the extension privilege cannot be considered abused because this filing was precipitated by the last minute efforts of Applicant to amend his answer just prior to the close of the discovery period. Justice requires that discovery be extended in one of the manners outlined in Section D above so that Opposer be permitted to conduct discovery on Applicant's final answer of record on this case which is almost certainly not yet on file with the TTAB. It would simply be unjust for discovery to close for good when Opposer does not know what Applicant's operative pleading in this case will be. Should the Board not agree with Opposer's Relief Request/Proposed Order, it requests that the Board grant such other relief (such as a different length of extension) as it may deem just and proper.

DATED this 23rd day of January, 2015.

Respectfully submitted,

BODY VIBE INTERNATIONAL, LLC

By: 

Thomas P. Philbrick, Esq.
John E. Russell, Esq.
Attorneys for Opposer

ALLMARK TRADEMARK®
2089 Avy Ave.
Menlo Park, CA 94025

Telephone: (650)233-2789
Facsimile: (650)233-2791
Email: tom@allmarktrademark.com
allmarktrademark@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S MOTION TO EXTEND DISCOVERY PERIOD AND TO SUSPEND OPPOSITION PENDING DISPOSITION OF CURRENTLY OUTSTANDING MOTIONS** has been served on Applicant's attorney of record by mailing said copy on January 23, 2015 via First Class Mail, postage fully prepaid to:

Mark S. Hubert, P.C.
Attn: Mark S. Hubert, Esq.
2300 SW First Ave., Suite 101
Portland, OR 97201

By: _____



Thomas P. Philbrick

Dated: _____

01/23/2015